IN THE HIGH COURT OF SWAZILAND

Crim. Case No. 150/94

In the matter between:

MNCEDISI MADI	1st Applicant
DAVID MTHOMBENI	2nd Applicant
XOLILE LUKHELE	3rd Applicant

and

THE KING	Respondent

CORAM:	Hull, C.J.
	Dunn, J.
	Twala, J.
	Zulman, J.

FOR APPLICANTS	Mr. Ntiwane
FOR CROWN	Mr. Donkoh

Judgment
(17/8/94)

The applicants seek bail pending their trial on a statutory charge, under section 3(1) of the Theft of Motor Vehicles Act, 1991, (Act No. 16 of 1991) of stealing a motor car.

On 24th August 1993, the Non-Bailable Offences Order 1993 (Order No. 14 of 1993) ("the Order") was published in the Gazette. The Order was enacted by The King-in-collaboration-with-the-Council, and had received the Royal Assent on 18th August. By section 1, it was provided that it should come into force on publication in the Gazette.

Section 3 of the Order provided as follows:

> "3. (i) Notwithstanding any provision in any other law, a Court shall refuse to grant bail in any case involving any of the offences in the Schedule hereto.
>
> "(ii) The Minister may amend the Schedule from time to time."

In section 2, the expression "Court" was defined to mean the High Court or a Magistrate's Court and the expression "Minister" to mean the Minister for Justice.

Nine offences were set out in the Schedule. They included such crimes as murder, rape, and robbery, but did not then include the contravention of section 3(1) of the Theft of Motor Vehicles Act, 1991.

By the Non-Bailable Offences (Amendment) Act 1994, (Act No. 4 of 1994) ("the Act") which came into force by publication in the Gazette on 17th June 1994, section 3(i) of the Order was replaced by section 2 of the Act by a subsection in the following terms:

> "Bail to be refused in certain circumstances.
> "3.(1) Notwithstanding any provision in any other law, a court shall refuse to grant bail to any person charged with any of the offences in the Schedule hereto."

Furthermore the Act provided in section 1(1): "This Act may be cited as the Non-Bailable Offences (Amendment) Act 1994 and shall be read as one with the Non-Bailable Offences Order 1993 (hereinafter referred to as 'the principal Order')."

Subsection (ii) remained unchanged.

Then on 15th July 1994, the Minister for Justice issued the Non-Bailable Offences (Amendment of Schedule) Notice, 1994 (Legal Notice No. 139 of 1994). He did this in the exercise of the powers

conferred on him by section 3 of the Order which, as previously mentioned, was enacted, as an Act of Parliament, by the Act. Paragraph 2 of that notice says:

> "2. The Schedule to the Non-Bailable Offences Order is hereby amended by adding the following:
>
> "10. A contravention of Section 3(1) of the Theft of Motor Vehicles Act, 1991."

It is to be noted that the amended section 3(1) omits the words "in any case involving" where they appeared in the Order, and substitutes the words "to any person charged with". This amendment was no doubt prompted by reason of the decisions of my brother Dunn J. in Methula and Another v. The King (Case No. 278/93), Nkwanyane v. The King (Case No. 279/93) and Gumedze v. The King (Case No. 305/93).

On these present applications for bail, counsel for the applicants contends that, in purporting to add to the Schedule to the Order contraventions of section 3(1) of the Theft of Motor Vehicles Act, 1991, the Minister has exceeded his powers. Counsel's submission can be summarised shortly in the following way.

Section 18 of the Theft of Motor Vehicles Act, 1991, as amended in 1992 (by Act No. 7 of 1992), provides as follows:

> "Provisions as to bail.
>
> "18(1) Where a person is charged with an offence under Section 3 or 5 the amount of bail to be fixed by a Court shall not be less than half the value of the Motor Vehicle stolen, and a deposit of the amount of bail so fixed by the Court shall be made in cash only notwithstanding any law to the contrary.
>
> "(2) Where there is a dispute as regards the value of a stolen Motor Vehicle the book value of the Motor Vehicle at the time of the theft as ascertained by

the Court from a Motor Vehicle dealer shall be taken to be the value of the Motor Vehicle.

"(3) Where a person is charged with any other offence under this Act the amount of bail to be fixed by a Court shall not be less than half the amount of maximum or minimum fine fixed for that offence.

"(4) No person charged with an offence under this Act shall be released on his own recognisance."

It was submitted by counsel for the applicants that this Act therefore contains its own provisions for the granting of bail, and confers a right to bail on a person who is charged with an offence under section 3 or section 5 of such Act. The Minister's notice under section 3 of the Order is on the other hand a form of delegated, subordinate legislation . On its proper construction, section 3 of the Order does not delegate to the Minister the power to amend the Schedule to the Order in such a way as to abrogate the provisions of an Act of Parliament, i.e. in this case the 1991 Act.

In support of the argument, counsel also submits that the right of a person to bail being a matter that bears upon his personal liberty and the presumption of innocence, the courts should construe strictly, in favour of the individual, the delegation of power to the Minister under section 3 of the Order.

Counsel has brought this present application on the basis that if the Minister's notice is not ultra vires for the reasons that he has advanced, then the applicants, as persons who stand charged with an offence under section 3(1) of the Theft of Motor Vehicles Act, 1991, are not entitled to bail, and that the application must accordingly fail.

Counsel's argument that the Minister has acted ultra vires cannot in my view be sustained.

5/...

The Order, as later amended by the Act, and the Ministerial notice do affect the jurisdiction of the High Court of Swaziland. The High Court is by virtue of section 104 of the Constitution a superior court of record having (inter alia) unlimited original jurisdiction in civil and criminal matters. The views of the Judges were not sought in the preparation of any of these measures. I am not aware that it has been demonstrated by factual analysis, in public debate or otherwise, that in respect of scheduled offences the granting of bail - at least by the High Court - had led to a high percentage of accused persons absconding, re-offending or interfering with Crown witnesses, while at liberty on bail awaiting trial.

The remanding of accused persons in custody, pending their trials, is a practical, interim measure that involves the balancing of the interests of the community against those of the individual. It does not affect the fundamental principle of justice that an accused person is presumed to be innocent unless and until he is found guilty, after a proper trial, by a court of law. Especially where there may be delay in bringing an accused person to trial, his remand in custody in the meantime is a severe incursion on his civil rights. Where a person is remanded in custody it is essential, if an acceptable standard of criminal justice is to be observed, that he should be afforded a trial as speedily as possible and that everyone who is involved in the administration of justice should accordingly strive towards that end. It is on the other hand a denial of justice either to confuse accusation with guilt or to regard the refusal of bail as a method of punishment.

Nevertheless, it is unquestionably the duty of a court of law, in construing enactments of the legislative authority, to give effect to the intention of the legislature, subject only to any rules of constitutional law that may deal with the exercise of that authority. Swaziland does not have a constitutional bill of rights, and no constitutional basis for impugning the notice has been advanced by counsel for the applicants.

There is also no doubt that the legislature may, by clear language in an enactment, delegate to some other authority the power to make

subordinate legislation. The power to declare that bail shall not be available to persons accused of specified offences does in my view involve an important point of principle concerning the personal liberty of the individual. In some jurisdictions, it is recognised as a tenet of good practice that ordinarily matters of principle should be enacted directly by the legislature itself, i.e. in principal legislation, and that delegated legislation should be confined to lesser matters of detail or machinery. Nevertheless that is not a universal view, and it is not a rule of law. It is the prerogative of the legislature itself to decide to whom it shall delegate its law-making authority and the extent to which it may choose to do so. There is no doubt that, by clear language, the legislature may go so far, if it sees fit, as to delegate to another authority the power to amend even Acts of Parliament. If authority needs to be cited for that proposition, it may be found in the case cited in argument by counsel for the applicants themselves, i.e. Van Heerden and Others NNO v. Queens Hotel (Pty) Ltd and Others 1973 2 SA 14 (R., A.D.) and especially the authorities collected there in the judgment of Beadle, C.J. at pages 16 and 17, and the judgment of MacDonald J.P. at page 28 B-C.

The canon of construction that judges should interpret strictly legislation that affects the liberty of the individual does not mean that it is open to a court of law to place an artificial or strained construction on the words of a statute, in derogation from the clearly expressed intention of the legislature. To embark upon that course would be to usurp the functions of the law - making authority, to confuse issues that are in reality matters of a political nature with those that are true legal issues and, eventually, to compromise the Judiciary's own proper authority. (cf. for example, the remarks of Holker, L.J. in Gibbs v. Guild (1882) 9 Q.B.D. 59 at page 75.)

In the present case, it is quite clear that the legislature intended to delegate to the Minister the power to add further offences to the Schedule to the Order.

Section 3 of the Order is explicit. Subsection (1) says that "Notwithstanding any provision in any other law", a court shall refuse

to grant bail to a person charged with an offence specified in the Schedule. (Cf. the remarks of Lewis, J.A. in Van Heerden (supra) at pages 35 in fin to 36 A.) I am not able to agree with counsel for the applicants that the Ministerial notice is in conflict with section 18 of the Theft of Motor Vehicles Act, 1991. That Act does not in my view, on its proper construction, confer a right to bail. Its own purpose was to restrict eligibility for bail in respect of the offences to which it refers. The Order and its amendment went even further, by curtailing eligibility for bail in respect of scheduled offences. In that, there is in my view no conflict.

In any event, the Order and the subsequent Act were enacted after the Theft of Motor Vehicles Act, 1991, and after that Act's own subsequent amendment. The legislature is to be taken as having had the earlier Acts in mind in 1993. The introductory words "Notwithstanding any provision in any other law" in section 3(1) of the Order are unlimited. They are, plainly, to be construed as including the earlier Acts. Moreover, it was unnecessary for the legislature also to insert those introductory words in subsection (2). That subsection is meaningless unless it is read together with subsection (1). The purpose of the first subsection is to stipulate that bail may not be granted for offences that are for convenience set out in a schedule, namely the Schedule to the Order. The point of subsection (2) is, simply, to delegate to the Minister the power to amend that schedule.

The language of the statute under consideration in this case, i.e. the Act of 1994, is clear and unambiguous. The duty of this court is to give effect to it. As pointed out by Tindal, C.J. as long ago as 1832, in Warburton v. Loveland (1832) 2 D and Cl. (H.L.) 480, at page 489:

> "Where the language of an Act is clear and explicit, we must give effect to it, whatever be the consequences, for in that case the words of the statute speak the intention of the legislature."

For these reasons, the applications for bail are dismissed.

DAVID HULL
CHIEF JUSTICE

I concur.

BEN DUNN
JUDGE

I concur.

A.F. TWALA
JUDGE

I concur.

RALPH ZULMAN
JUDGE